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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE TEXAS COURT OF CRIMINAL APPEALS

THE STATE OF TEXAS
Petitioner
v.
JOSE OLIVA
Respondent

On Review from No. 14-15-01078-CR
in which the Fourteenth District Court of Appeals
considered Cause Number 2025101
from County Criminal Court at Law No. 1
Harris County, Texas
Hon. Paula Goodhart, Judge Presiding

Brief of Amicus Curiae the National College for DUI Defense (NCDD), the DUI Defense Lawyer Association (DUIDLA), the Dallas Criminal Defense Lawyer Association (DCDLA), and the Denton County Criminal Defense Lawyer Association (DCCDLA) in Support of the Trial Court's Verdict

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TABLE OF CONTENTS

Index of Authorities

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION AND STATEMENT OF AMICUS INTEREST

Neither party to the PDR contests the Court of Appeals conclusion that the DWI prior conviction (whether Class B or class A) is an element of the offense of DWI (enhanced to Class A) to be proven up by the State during the guilt or innocence phase. While it is in the interest of the Respondent (Defendant in the trial court) and the State to make the claim that proof of a prior conviction of DWI is an element of the enhanced DWI, the assertion is not a correct statement of the law; it is not supported by Texas statutes and Texas case law. For that reason, the Denton County Criminal Defense Lawyer Association (DCCDLA), together with the Dallas Criminal Defense Lawyer Association (DCDLA) are submitting this Amicus brief.

Furthermore, it is almost universally held throughout the country that a prior DWI conviction in a misdemeanor DWI case serves as a sentencing enhancement and evidence thereof is to be presented to the judge at sentencing, rather than an as element of the offense, to be proved beyond a reasonable doubt to the jury. For that reason, the above Amicus party is joined on this brief by the national DUI Defense Lawyers Association (DUIDLA) and the National College for DUI Defense (NCDD).

INTEREST OF AMICUS CURIAE DUIDLA

The DUI Defense Lawyers Association (DUIDLA) is a nonprofit professional organization of lawyers with approximately 850 members throughout North America. The DUIDLA does not support drunk driving and does not lobby the state legislatures relative to issue of punishment for such offenses or any other matters. The purpose and mission of the DUIDLA is to vindicate the promise of the United States Constitution that an accused citizen has the right to the effective assistance of his or her counsel and to fundamental fairness, in particular, when the individual is charged with driving under the influence.

The DUIDLA seeks to fulfill its mission primarily through education, by providing the finest advanced-level training available to the DUI defense practitioners, and also through filing Amicus Briefs when cases come to its attention that may have an impact of a significant number of citizens. The DUIDLA is guided by the principle that "injustice anywhere, is a threat to justice everywhere."

DUIDLA members in Texas have a strong interest in this Honorable Court's decision in this case and thus the DUIDLA is offering this brief in hopes that it will provide relevant information that will aide this Honorable Court in reaching a decision that is just, proper, and wise.

INTEREST OF AMICUS CURIAE NCDD

NCDD is a nonprofit professional organization of lawyers, with over 2,000 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its educational programs, its website, and its email list, the College trains lawyers to represent persons accused of drunk driving. NCDD's members have extensive experience litigating issues regarding breath blood and urine tests for alcohol and other drugs. NCDD has appeared as amicus curiae in several drunk driving cases before the Supreme Court of the United States.

INTEREST OF AMICUS CURIAE DCCDLA

The Denton County Criminal Defense Lawyer Association (DCCDLA) is a nonprofit professional organization of lawyers with approximately 200 members in the State of Texas. All members of DCCDLA are practicing criminal defense attorneys. The purpose and mission of the DCCDLA is educate the members by providing Continuing Legal Education on a variety of subjects related to criminal law, and to vindicate the promise of the United States Constitution that an accused citizen has the right to the effective assistance of his or her counsel and to fundamental fairness, in particular, when the individual is charged with driving under the influence.

DCCDLA members have a strong interest in this Honorable Court's decision in this case and thus the DCCDLA is offering this brief in hopes that it

will provide relevant information that will aide this Honorable Court in reaching a decision that is just, proper, and wise.

INTEREST OF AMICUS CURIAE DCDLA

The Dallas Criminal Defense Lawyer Association (DCDLA) is a nonprofit professional organization of lawyers with approximately 500 members in the State of Texas. The DCDLA does not support drunk driving and does not lobby the state legislatures relative to issue of punishment for such offenses or any other matters. The purpose and mission of the DCDLA is educate the members by providing Continuing Legal Education on a variety of subjects related to criminal law, and to vindicate the promise of the United States Constitution that an accused citizen has the right to the effective assistance of his or her counsel and to fundamental fairness, in particular, when the individual is charged with driving under the influence.

Statement of Case and Facts

Adoption of Fact Statement by Amicus Curiae

Amicus DUIDLA, Amicus NCDD, Amicus Dallas Criminal Defense Lawyers Association, and Amicus Denton County Criminal Defense Lawyers Association each adopt the Statement of the Facts as laid out below and believes it provides a short and concise summary of the facts and issues in this matter.

Respondent was convicted of DWI pursuant to Texas Penal Code 49.04.

That conviction was enhanced from class B to class A with a prior DWI Conviction pursuant to Texas Penal Code 49.09(a). On direct appeal, counsel for the Defendant/Appellant argued that the Defendant's first DWI conviction was an element of the offense that the State failed to prove during guilt-innocence. The prior conviction was proven up during punishment.

The Court of Appeals, Fourteenth District (Houston) vacated the conviction and found that the first DWI offense was a factual element of the subsequent DWI (enhanced to Class A with additional mandatory punishment). Because the State failed to prove an element of the offense, to-wit: Respondent's first DWI conviction, during the guilt-innocence phase of trial, the case was sent back for resentencing as a Class-B Misdemeanor. *Oliva v. State*, 525 S.W.3d 286, 2017 Tex. App. LEXIS 2594 (Tex. App. Houston 14th Dist. Mar. 28, 2017), pet. granted No. PD-0398-17, 2017 Tex. Crim. App. LEXIS 650 (Tex. Crim. App. July 26, 2017).

The State petitioned for review, which was granted in the instant case. No. PD-0398-17, 2017 Tex. Crim. App. LEXIS 650 (Tex. Crim. App. July 26, 2017). Briefing was ordered, and argument was held. *Id.* The case was submitted on November 1, 2017.

Neither party to the PDR contests the Court of Appeals conclusion that the prior DWI conviction is an element of the subsequent misdemeanor DWI (enhanced to Class A). *See* State's Br. at 7 – 12, Resp't. Br. at 18 – 22. The Amicus

Curiae believe the Trial Court correctly decided the issue and that the position of the parties regarding whether the DWI conviction is an element of the offense of DWI (enhanced to Class A) is incorrect.

AMICUS STATEMENT OF ISSUE

The existence of a prior DWI conviction must affect both punishment and the jurisdiction of the court in order to be an element of the offense of misdemeanor DWI; because the prior DWI conviction affects only the punishment of the offense and has no bearing on the jurisdiction of the trial court, the prior DWI conviction is not an element of the offense of DWI (Class A).

LAW and ARGUMENT

Both Petitioner and Respondent err in the Conclusion that a prior DWI conviction is an element of the offense of DWI (Class A) where the existence of a prior DWI conviction affects only the punishment to be assessed and has no bearing on the jurisdiction of the court hearing the case.

I. Penal Code 49.09(a) is a punishment enhancement and is not an element of the offense of DWI

An "element of the offense means: the forbidden conduct, the required culpability, any required resulted, and the negation of any exception to the offense." Tex. Penal Code 1.07(a)(22).

"When prior convictions are alleged for purposes of enhancement only

and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07." Tex. Code Crim. Proc. Art. 36.01(a)(1)(emphasis added).

Both the State and Respondent err in their analysis of whether a prior DWI conviction (Class-B or -A) is an element of the offense of DWI (Class A) because they both fail to appreciate the significant import of the conjunction '**and**' within Article 36.01 in the context of the Section 1.07(a)(22) definition of an element of the offense. *See* State's Br. at 7 – 12; Brief for the State Prosecuting Attorney as Amicus Curiae at 4 – 6; Resp't. Br. at 18 – 22. The State asserts the Court of Appeals is correct in determining the a prior DWI conviction is an element of the offense of DWI (Class A). This flatly contradicts the State's position taken on direct appeal, and further is inconsistent with the drafting of the misdemeanor information that brought the charges in this case and with twenty-five years of how Section 49.09(a) has been applied in practice. The interpretation of "purposes of enhancement only **and** are not jurisdictional" requires **both** enhancement of punishment **and** effect on jurisdiction in order to be an element of the offense. Requiring both an effect on jurisdiction and an effect on punishment in order for a prior conviction to be admissible during guilt-innocence is the majority view. *Wood v. State*, 260 S.W.3d 146, 148 – 49 (Tex. App.—Houston [1st Dist.] 2008, no pet.). This position has

been taken by the majority of the courts to rule on this issue and is supported by interpretation of similar statutes. *See Prihoda v. State,* 352 S.W.3d 796, 806 (Tex. App.—San Antonio 2011, pet. ref'd); *Wood v. State*, 260 S.W.3d 146, 147, 149 (Tex. App.— Houston [1st Dist.] 2008, no pet.); *Blank v. State*, 172 S.W.3d 673, 676 (Tex. App.—San Antonio 2005, no pet.); and *Love v. State*, 833 S.W.2d 264, 265-66 (Tex. App.—Austin 1992, pet. ref'd); *see also* Tex. Transp. Code 547.457(f)[1]; Tex. Penal Code 31.03(e)(4)[2]; Tex. Penal Code 49.09(b).[3]

Indeed, the Fourteenth Court of Appeals is the sole outlier holding its view; no other court has adopted its reasoning. *See Oliva v. State*,525 S.W.3d 286, 292 (Tex. App – Houston [14th Dist.] 2017) citing its prior decision in *Mapes v. State*, 187 S.W.3d 655, 658 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Indeed, if the language of 49.09(a) were intended to be interpreted as the Parties argue, every other court in Texas has been incorrectly applying Penal Code 49.09(a) since the 1993 enactment whose wording is contested here. *See* Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § 1.01, effective September 1, 1994

Here, the Court of Appeals fails to recognize the pattern in Article

[1] This code section deprives the municipal court of jurisdiction, gives the county court jurisdiction, and enhances punishment to a Class B misdemeanor if previously convicted of DWLI. See also Tex. Code Crim. Proc. Ann. art. 36.01(a)(1).

[2] This code section deprives the county court of jurisdiction, give the district court jurisdiction, and enhances punishment to a State Jail Felony if previously convicted twice of theft. See also Tex. Code Crim. Proc. Ann. art. 36.01(a)(1)

[3] This code section deprives the county court of jurisdiction, give the district court jurisdiction, and enhances punishment to a Third-Degree Felony if previously convicted twice of DWI. See also Tex. Code Crim. Proc. Ann. art. 36.01(a)(1)

36.01(a)(1) where **both** the enhancement of punishment **and** an effect on jurisdiction are required prior to a conviction becoming an element of the offense. By failing to recognize this pattern, the Fourteenth Court of Appeals treats a recidivist-deterring punishment statute as an element of the substantive offense. The Court of Appeals errs, but only because the Parties erred in also failing to understand the conjunctive nature of Article 36.01(a)(1).

Consistent with the U.S. Supreme Court's tradition, the Court said long ago that a State need *not* allege a defendant's prior conviction in the indictment or information which alleges the elements of an underlying crime, even if that same conviction was "necessary to bring the case within the statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 243-44, 118 S. Ct. 1219, 1231 (1998) quoting *Graham* v. *West Virginia*, 224 U.S. 616, 624, 56 L. Ed. 917, 32 S. Ct. 583 (1912); That conclusion followed, the Court said, from "*the distinct nature of the issue*," and the fact that recidivism "does not relate to the commission of the offense*, but goes to the punishment only*, and therefore ... may be subsequently decided." *Graham*, at 629 (emphasis added). The Court has not deviated from this view. *See Oyler* v. *Boles*, 368 U.S. 448, 452, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962); (A charge under a recidivism statute does not state a separate offense, but goes to punishment only).

Congress, reflecting this tradition, has never made a defendant's recidivism an element of an offense where the conduct proscribed is otherwise unlawful.

See United States v. *Jackson*, 262 U.S. App. D.C. 294, 824 F.2d 21, 25, and n. 6 (CADC 1987) (R. Ginsburg, J.) (referring to fact that few, if any, federal statutes make "prior criminal convictions ... elements of another criminal offense to be proved before the jury"). *See Almendarez-Torres v. United States*, 523 U.S. 224, 243-44, 118 S. Ct. 1219, 1231 (1998)

The Court of Appeals erred in determining the offense of DWI (enhanced to Class A) requires the State prove, as an element of the offense, the Defendant's prior DWI conviction. The prior conviction for DWI is not "the forbidden conduct, the required culpability, any required resulted, and the negation of any exception to the offense" and is therefore outside the definition of an element of the offense. Tex. Penal Code 1.07(a)(22). The prior DWI conviction affects punishment only and does not affect jurisdiction; therefore, it is not an element of the offense as contemplated by Article 36.01(a)(1).

Both parties, and the Court of Appeals, incorrectly determined that the phrase "if it is shown on the trial of the offense" is equated to "if it is shown during guilt-innocence." Trials have been bifurcated in Texas since the 1965 amendment to the Code of Criminal Procedure. *See* Code of Criminal Procedure Act, 59th Leg., R.S., ch. 722, § 1, art. 37.07, sec. 2, 1965 Tex. Gen. Laws, vol. 2, p. 317, 462. The bifurcation statute provides, "In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, *which are tried before a jury on a plea of not guilty*, the judge shall, before

argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed." *Barfield v. State*, 63 S.W.3d 446, 449-50 (Tex. Crim. App. 2001); *quoting* TEX. CODE CRIM. PROC. art. 37.07, § 2(a) (emphasis in *Barfield*); *see also* Tex. Code Crim. Proc. Ann. art. 36.01(a)(1).

An indictment or information must set forth each element of the crime that it changes. *Almendarez-Torres v. United States*, 523 U.S. 224, 228-29, 118 S. Ct. 1219, 1223 (1998). The indictment or information need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime. This is precisely the reason that a prior DWI conviction (Class B or A - prior conviction) is listed in the misdemeanor information as an enhancement paragraph, and not as an element of the offense. Within limits, the question of which factors are which is normally a matter for the Legislature. *See McMillian v. Pennsylvania*, 477 U.S. 79, 84-91, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986); *Staples v. United States*, 511 U.S. 600, 604, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994) (definition of a criminal offense entrusted to the legislature, "'particularly in the case of federal crimes, which are solely creatures of statute'")(*quoting Liparota v. United States*, 471 U.S. 419, 424, 85 L. Ed. 2d 434, 105 S. Ct. 2084 (1985)).

The first step is to determine what the Legislature intended. *See Almendarez-Torres v. United States*, 523 U.S. 224, 228-29, 118 S. Ct. 1219, 1223 (1998). "Did it intend the factor that the statute mentions, the prior aggravated

felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment? In answering this question, we look to the statute's language, structure, subject matter, context, and history -- factors that typically help courts determine a statute's objectives and thereby illuminate its text." Id. See, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 1997 U.S. LEXIS 1, *14, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997); *Garrett* v. *United States*, 471 U.S. 773, 779, 85 L. Ed. 2d 764, 105 S. Ct. 2407 (1985).

Here, the offense of DWI (Class B) includes these elements: "A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." Tex. Penal Code § 49.04(a). The punishment range is set by Section 49.04(b). That punishment range is further modified by Section 49.09(a): "Except as provided by Subsection (b), an offense under Section 49.04, 49.05, 49.06, or 49.065 is a Class A misdemeanor, with a minimum term of confinement of 30 days, if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated, …." Tex. Penal Code § 49.09(a). There is no support for the proposition that "on the trial of the offense" means *during guilt-innocence* (see Section II, *post*).

In a trial for DWI (enhanced to a Class A by prior conviction of DWI), whether the Defendant has a prior DWI effects **only** the punishment to be

imposed. The existence of a DWI prior conviction (whether Class B or Class A) has no bearing on the County Court's jurisdiction. Because the enhanced-by-prior-DWI-conviction DWI (Class A) is heard in the county court without regard to the existence of a prior DWI conviction, the prior DWI conviction has no bearing on the Court's jurisdiction and is not an element of the offense as defined by the penal code. Concluding that prior DWI conviction is an element of the subsequent Class A DWI is incorrect.

"When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07." Tex. Code Crim. Proc. Art. 36.01(a)(1). In the case of a DWI Third of More, the prior convictions affect **both** enhance punishment **and** are jurisdictional in nature. This is exactly why the two prior DWIs are admissible as an element of the offense for DWI Third or More: the priors are necessary to establish the *jurisdiction* of the District Court. *See* Tex. Pen. Code 49.09(b).

Contrast the DWI Third or More, where the priors are a jurisdictional element of the offense, to misdemeanor DWI (enhanced by prior conviction to Class A), where the prior is relevant exclusively to punishment and not to jurisdiction. For a DWI Third or More, prior DWIs are read into the charging instrument because they **both** enhance punishment **and** provide for the Court's

jurisdiction. For a DWI (enhanced by prior to Class A), the prior DWI enhances punishment but **does not** alter the Court's jurisdiction. Because, in the case of a DWI (enhanced by prior conviction to Class A), the prior DWI only enhances punishment and is not jurisdictional, that "portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07." Tex. Code Crim. Proc. Art. 36.01(a)(1).

II. Statutory language that "if it is shown on the trial of the offense" does not require a showing during guilt-innocence.

A. The nature of a bifurcated trial allows the State the opportunity to prove up a punishment enhancement after a finding of guilt, rather than contemporaneously with a finding of guilt.

Both parties and the Court of Appeals err in interpreting "if it is shown on the trial of the offense" to mean "if it is shown during guilt-innocence." Jurors are prohibited from considering punishment prior to determining guilt. Tex. Code Crim. Proc. Ann. art. 37.07, § 2(a). The prior DWI conviction is not an element of DWI (enhanced by prior to Class A). *See King v. State*, No. 05-05-00446-CR, 2006 Tex. App. LEXIS 131, at *6 (App.—Dallas Jan. 6, 2006)(memo. op. not designated for publication) (The trial court found that appellant had one previous DWI conviction, which elevated the offense punishment from a class B misdemeanor to a class A misdemeanor.).

Section 49.09 bears the title "Enhanced Offenses and Penalties." It specifically refers to section 49.04, that is, "Driving While Intoxicated." Consequently, section 49.09 is properly construed as an enhancement provision. *In re State ex rel. Hilbig*, 985 S.W.2d 189, 191 (Tex. App.—San Antonio 1998) citing *Rizo v. State*, 963 S.W.2d 137, 139(Tex. App.--Eastland 1998, no pet.); *Mahaffey v. State*, 937 S.W.2d 51, 54 (Tex. App.--Houston [1st Dist.] 1996, no pet.); *see also Washington v. State*, 677 S.W.2d 524, 527 (Tex. Crim. App. 1984)(describing habitual offender statute as enhancement provision, not a separate offense).

Again, a contrast between DWI Third or More, where the priors are a jurisdictional element of the offense, to DWI (enhanced by prior conviction), where the prior is relevant exclusively to punishment, and not to jurisdiction, provides utility. For a DWI Third or More, prior DWIs are read into the charging instrument because they **both** enhance punishment **and** provide for the Court's jurisdiction. For a DWI (enhanced by prior to Class A), the prior DWI conviction enhances punishment but **does not** alter the Court's jurisdiction. Because, in the case of a DWI (enhanced by prior conviction of the same to Class A), the prior DWI only enhances punishment and is not jurisdictional, that "portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07." Tex. Code Crim. Proc. Art. 36.01(a)(1).

B. The State errs in relying on State-Jail Felony enhancements to support the finding that 49.09(a) is an element of the offense.

There are many places in the Laws of the State of Texas where a particular fact of consequence is determinative of the punishment range for an offense. Dollar amounts of loss by a victim are a common metric for the level of offense charged. In limited circumstances, a prior criminal conviction may be a fact of consequence the State must prove beyond a reasonable doubt, however, in **every** statute where the fact of consequence is a conviction, that conviction is essential to the jurisdiction of the Court. *See illustratively* Tex. Transp. Code 521.457(f), *supra*, (prior DWLI conviction invokes county court jurisdiction instead of municipal court jurisdiction); Tex. Penal Code 49.09(b), *supra*, (two prior DWI convictions vest District Court, instead of County Court, with jurisdiction); Tex. Penal Code 31.03(e)(4), *supra*, (two prior misdemeanor theft convictions vest District Court with jurisdiction over third or greater theft); Tex. Penal Code 38.04 (prior evading enhances subsequent evading thereby depriving the county court of jurisdiction, vesting the district court with jurisdiction, and enhancing punishment)..

"[S]ection 49.09(a) is a special enhancement provision applicable only to persons convicted of operating a motor vehicle while intoxicated. It specifically addresses **sentencing** for offenses where, as here, the defendant has one prior

DWI conviction." *State v. Cooley*, 401 S.W.3d 748, 750 (Tex. App.—Houston [14th Dist.] 2013) (emphasis added); *See State v. Morgan*, 160 S.W.3d 1, 4 (Tex. Crim. App. 2004). This is a penalty provision, not an element of the offense. *Id. See also Guinn v. State*, 696 S.W.2d 436, 438 (Tex. App.—Houston [14th Dist.] 1985)("The rationales in support of the DWI enhancement scheme are obvious: (1) repeat offender should be punished more severely for repeatedly endangering the public welfare; (2) harsher penalties for repeat offenders function as a deterrent, discouraging the offender and others from drinking and driving; and (3) the jail sentence for repeat offenders in [former] art. 6701*l*-1(e) [now 49.09] reflects the need to physically remove drunk drivers from public streets for a period of time, both as punishment for them and as protection for the rest of society.")

Appendix A of the State Prosecuting Attorney's post-argument Amicus brief provides a laundry list of purported examples of how "if it is shown at trial" is a guilt-innocence requirement. The list can be broken down into three categories of statutes: (1) statutes where the fact that must be proven is jurisdictional [*e.g.* Tex. Transp. Code 521.457, Tex. Transp. Code 545.420, Tex. Transp. Code 644.151, Tex. Fam. Code 261.109], (2) statutes where the dollar amount in controversy determines the jurisdiction of the court **and** the punishment range for the offense [*e.g.* Tex. Gov't Code 466.306, Tex. Gov't Code 466.307, Tex. Gov't Code 466.308, Tex. Nat. Res. Code 151.052, Tex. Penal Code 33.023], and (3) statutes where an otherwise-non-criminal act is a fact of

consequence providing for a higher punishment [e.g. Tex. Penal Code 15.031, Tex. Penal Code 20.05, Tex. Penal Code 32.31, Tex. Penal Code 15.031, Tex. Penal Code 35A.02].

Notably absent is any other statute where a prior non-jurisdictional criminal offense is treated as an element of the greater offense. Not a single offense listed by the State makes a prior conviction an element of the offense unless the conviction effects **both** the jurisdiction of the court **and** the punishment range of the offense. Adopting the Parties' argument would result in creating an exception to this rule: the DWI with prior conviction would be the **only** criminal offense in Texas where a prior criminal conviction is an element of the offense that effects **solely** punishment and not jurisdiction.

C. *Carlton v. State*, relied upon heavily by the Fourteenth Court of Appeals, supports the Amicus position regarding how to interpret Article 36.01.

The Fourteenth Court of Appeals relies heavily upon *Carlton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005). *Carlton* discusses whether a prior evading arrest is an element of the enhanced State Jail Felony offense of evading arrest. *Carlton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005). *Carlton* finds that the prior evading is an element of the offense. The Amicus assert that *Carlton* is correct under their interpretation of Article 36.01(a)(1) because, for the offense of evading arrest, the existence of the prior effects **both** the jurisdiction of the

court (deprives county court of jurisdiction and vests jurisdiction in the district court) **and** enhances punishment (State Jail Felony instead of Class A misdemeanor). *See* Tex. Code Crim. Proc. Ann. art. 36.01(a)(1). *See also* Section I, *supra*.

D. Treating 49.09(a) as a sentencing enhancement leaves Texas law in line with federal law regarding how recidivism statutes are interpreted.

Where the conduct at issue is independently unlawful, as is the case with DWI, the lower federal courts are near unanimous that statutes authorizing high sentencing for recidivist offenders are sentencing factors, not elements of an offense. *See e.g.*, *United States* v. *McGatha*, 891 F.2d 1520, 1525 (CA11 1990) (18 U.S.C. § 924(e)); *United States* v. *Arango-Montoya*, 61 F.3d 1331, 1339 (CA7 1995) (21 U.S.C. § 841(b)); *United States* v. *Jackson*, 262 U.S. App. D.C. 294, 824 F.2d 21, 25, and n. 6 (CADC 1987). And we have found no statute that clearly makes recidivism an offense element in such circumstances." *Almendarez-Torres v. United States*, 523 U.S. 224, 230, 118 S. Ct. 1219, 1224 (1998).

E. The DWI prior conviction (Class B or A) must be proven beyond a reasonable doubt as an enhancement paragraph.

Article 37.07 requires that any extraneous conduct be proven beyond a reasonable doubt. Tex. Code Crim. Proc. Ann. art. 37.07 sec. 3(a)(1). Because the prior DWI conviction must be proven beyond a reasonable doubt without regard to whether it is a punishment enhancement or an element of the offense, the

level and type of proof is immaterial to determining this issue.

III. Public policy considerations weigh heavily against allowing introduction of extraneous offenses during guilt-innocence where the extraneous offense is not material to both punishment and the jurisdiction of the court.

Allowing extraneous offense evidence during trial is inherently prejudicial to the accused. Use of such evidence serves only to create a "bad man" inference against the accused, undermines the presumption of innocence, and deprives the accused of his due process right to a fair trial. *See* US CONST amend VI. Finding that the prior DWI conviction is an element of DWI (enhanced by prior conviction to Class A) would give the jury every excuse to convict the accused for their guilt on the first DWI rather than the strength of the second.

> [T]he notion of the prejudice incurred "encompasses two distinct tendencies of jurors. The first is the tendency to convict a man of the crime charged, not because he is guilty of that offense, but because evidence introduced indicates that he had committed another unpunished crime or that he is a "bad man" who should be incarcerated regardless of his present guilt."
> OTHER CRIMES EVIDENCE AT TRIAL: OF BALANCING AND. OTHER MATTERS. 70 Yale L. J. 763 citing WIGMORE, EVIDENCE §§ 57, at 456; *id.* § 194, at 650 (3d ed. 1940).

The accused will be further prejudiced by the "tendency to infer that because the accused committed one crime, he committed the crime charged. In many instances this inference rests on no greater foundation than the belief that commission of one crime indicates a propensity to commit others." *See* OTHER

CRIMES EVIDENCE AT TRIAL: OF BALANCING AND. OTHER MATTERS. 70 Yale L. J. 763, 764 *citing* 1 WIGMORE § 194, at 650 ("the over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts"). *See also* Harry Kalven, Jr. & Hans Zeisel, The American Jury 160-61, 178-79 (Univ. of Chicago Press 1971).

If the accused is to be convicted, that conviction should be for the offense(s) for which the accused was indicted, and not for any other conduct. In our legal system the accused are accountable "for what they do and not for what they are." Herbert L. Packer, The Limits of the Criminal Sanction 74 (1968)). "[T]he use of un-adjudicated offenses violates due process substantively, procedurally, and through the erosion of the fundamental principle of the presumption of innocence. UNRELIABLE AND PREJUDICIAL: THE USE OF EXTRANEOUS UNADJUDICATED OFFENSES IN THE PENALTY PHASES OF CAPITAL TRIALS, 93 Colum. L. Rev. 1249, 1282.

> Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. … [T]he founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion.
> 4 W. Blackstone, Commentaries on the Laws of England 349 - 350 (Cooley ed. 1899) cited by *Duncan v. Louisiana*, 391 U.S. 145, 151-52, 88 S.Ct. 1444, 1448-49 (1968).

Courts and commentators have repeatedly expressed that it is impossible

to determine the actual basis for a jury's finding of guilt. *See* Goldberg, Steven. Harmless Error: Constitutional Sneak Thief, 71 J. Crim. L. & Criminology 421, 134 (1980); *Bruton v. United States*, 391 U.S. 123, 136, 88 S.Ct. 1620, 1628 (1968)(abrogated by statute). "[T]ests on "credibility" evidence … tend to confirm the widely held view that instructions to the jury to ignore prejudicial other crimes evidence, or to limit its use to a certain issue, are ineffective." *See* OTHER CRIMES EVIDENCE AT TRIAL: OF BALANCING AND. OTHER MATTERS. 70 Yale L. J. 763, 765 & n.14.

Justice Jackson's oft-quoted remark in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) is instructive: "The naive assumption that prejudicial effects [of extraneous offenses] can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949). Justice Jackson does not overstate the issue. Anyone who has ever spoken with a jury after a trial knows that curative instructions are a legal fiction with near zero functional utility. *See further* Lacy, Admissibility of Evidence of Crimes Not Charged in the Indictment, 31 ORE. L. REV. 267, 277 (1952) ("A pregnant question even though successfully objected to may do about as much harm as a question answered."); MCCORMICK § 43 at 93, § 53 at 122-23; 3 WIGMORE § 988.

The Court should give grave consideration to these policy issues prior to deviating from the long standing (and to-date without exception) position that a

prior criminal offense is only an element of another offense where the predicate offense effects **both** the jurisdiction of the court hearing the case **and** the punishment to be assessed.

PRAYER

The trial court's original verdict was correct. WHEREFORE, the Amicus pray the Court give due consideration to the arguments made and authorities cited prior to issuing an opinion in this matter, and that the Court REVERSE the Court of Appeals and AFFIRM the judgment of the trial court.

Respectfully submitted

/s/ J. Edward Niehaus

J. Edward Niehaus

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies the contents of this brief comply with the Tex. R. App. P. Rule 9.4(i)(3). The number of words in this brief, as calculated by Microsoft Work and excluding portions as provided by Tex. R. App. P. Rule 9.4(i)(1) is 5,302

/s/ J. Edward Niehaus

J. Edward Niehaus

CERTIFICATE OF SERVICE

A true and correct copy of this Brief of Amicus Curiae has been served

on the State Prosecuting Attorney (infomation@spa.texas.gov), the Harris County District Attorney's Office (mclean_patricia@dao.hctx.net), and on Ted Wood/the Harris County Public Defender's Office (Ted.Wood@pdo.hctx.net) (Counsel for the Respondent) via electronic service of the same to the email addresses indicated herein on this Thursday, February 22, 2018

Additionally, paper copies of the same will be mailed to the Court within 24 hours of receipt of a file-stamped copy.

/s/ J. Edward Niehaus

J. Edward Niehaus